

***United States Court of Appeals
for the Second Circuit***



APPENDIX

74-1550

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IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-1550

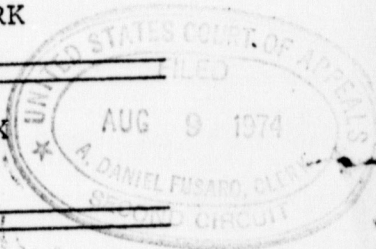
THE UNITED STATES OF AMERICA,
Plaintiff-Appellee,
-against-
CARMINE TRAMUNTI, et al.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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DEFENDANTS-APPELLANTS' JOINT APPENDIX
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THE COURT: All right, agent. You recall

you were sworn just a few moments ago, right?

THE WITNESS: Yes, sir.

THE COURT: Go ahead, Mr. Phillips.

DIRECT EXAMINATION

BY MR. PHILLIPS:

Q Mr. Nolan, by whom are you employed?

A By the Drug Enforcement Administration, Justice
Department.

Q As a special agent?

A That's correct.

Q How long have you been so employed?

A Since June of 1971.

Q And are you assigned here to the New York
office?

A That's correct.

Q Directing your attention to the evening hours
of October 3, 1973, did you have occasion that evening to
see a person by the name of Hattie Ware?

A That's correct.

Q And was she under arrest then?

A That's correct.

Q Do you see her in the courtroom?

A Yes, sir.

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Q Would you point her out, please?

MR. PANZER: I will concede the identification.

THE COURT: All right. The identification is conceded.

Q And approximately what time did you see her that evening for the first time?

A It was approximately 9 o'clock in the evening, I think.

Q And where was it?

A It was in our headquarters at 555 West 57th Street.

MR. PHILLIPS: If the court please, may I have this marked as a government's exhibit.

(Government's Exhibit 85 was marked for identification.)

Q I show you what has been marked Government's Exhibit 85 for identification, Agent Nolan. Tell us if you can identify that (handing).

A Yes, sir. That is the address book that was found on Hattie Ware.

Q And did you take that from Hattie Ware that evening?

A Another agent did.

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Q And gave it to you?

A That's correct, sir.

MR. PHILLIPS: If I could, I would like to have this particular page marked for identification as 85A.

(Government's Exhibit No. 85A was marked for identification.)

Q I show you what has been marked, a page in this book, as Government's Exhibit 85A for identification.

Would you look at that and tell us whether any of the telephone numbers on that particular page you gave to any other agent that evening?

A Yes. I gave to Agent Art Carter one telephone number, which is 562-9--

MR. ELLIS: Objection.

THE COURT: Don't give us the number.

Go ahead. He gave a number.

MR. PHILLIPS: The government offers Government's Exhibits 85 and 85A for identification.

Your Honor, we are offering Government's Exhibit 85A only and withdraw the offer on Government's Exhibit 85.

MRS. ROSNER: Is the offer the entire book

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2 || or some section of it?

3 THE COURT: No, one page.

4 (Pause.)

5 MR. PHILLIPS: Your Honor, in light of some
6 stipulations that I am going to announce the government
7 withdraws the offer of both exhibits.

8 The stipulation is as follows:

9 That a number, which is 562-9330, appearing in
10 this address book under the B section, was given by
11 Agent Nolan to Art Carter, Agent Art Carter.

12 MR. PANZER: Your Honor, subject to our
13 prior discussions, I will so stipulate.

14 THE COURT: Yes.

15 MR. ELLIS: Your Honor, we object on grounds
16 of relevancy. We, of course, have entered into no such
17 stipulation.

18 THE COURT: Yes, I understand.

19 Q. Later that evening or the early morning hours
20 of October the 4th, did you have occasion to go to 150 West
21 225th Street?

22 A That's correct.

23 Q About what time?

24 A To the best of my recollection, it was somewhere
25 in the neighborhood of 1, 2 o'clock in the morning on

October the 4th.

Q Did you go to a particular apartment there?

A That's correct, apartment 2H.

Q And were there any agents or fellow agents from the Drug Enforcement Administration there when you arrived?

A That's correct. There were approximately four to five agents.

Q And was there anybody there besides agents?

A Yes, Estelle Hansen.

Q Did you come to know her by any other name?

A Yes, the name Bunny.

Q I show you, Agent Nolan, what have been marked Government's Exhibits 74 in evidence, 68 in evidence, 72 in evidence, 39 in evidence, 70 in evidence and 67 in evidence, all photographs.

Can you identify those photographs?

A Yes. The photograph marked 67 is of Basil Hansen.

Q I don't think it is necessary, Agent Nolan, to go into who is in the photographs, but when was the first time that you ever saw those photographs.

A I saw all these photographs on the early morning hours of October the 4th.

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2 Q Where?

3 A At 150 West 225th Street.

4 Q At apartment 2H?

5 A That's correct.

6 Q And you collected them from that apartment?

7 A Yes, I collected them from that apartment.

8 MR. PHILLIPS: May I have this envelope
9 and its contents be marked as an exhibit.

10 May these documents be marked as an exhibit.

11 (Government's Exhibits 86 and 86A were marked
12 for identification.)

13 Q I show you Government's Exhibits 86 and 86A
14 marked for identification.

15 Can you tell us what those documents are,
16 Agent Nolan (handing).

17 A Yes. One is an envelope addressed to Mrs.
18 Hattie Ware with 150 West 225th Street, another one is
19 an apartment lease addressed to Hattie Ware.

20 Q When did you first see those documents?

21 A In the early morning hours of October the 4th.

22 Q Where?

23 A In apartment 2H at the address 150 West 225th
24 Street.

25 Q And did you take those from the apartment

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at the same time you took the photographs you just mentioned?

A Yes, sir.

(Government's Exhibit 87 was marked for identification.)

Q I show you Government's Exhibit 87 for identification, Agent Nolan.

Can you identify that or those series of documents (handing).

A Yes. They are telephone bills which I
confiscated at 150 West 225th Street, apartment 2H, at
the same time as the pictures.

MR. PHILLIPS: The government offers 86,
86A and 87 for identification.

MR. PANZER: Your Honor, subject to our prior discussions, I have no objection with the stipulation that Mr. Phillips and I had agreed to.

THE COURT: Yes.

(Pause.)

MR. FISHER: Objection, if your Honor please,
on the grounds of relevancy. By the government's own
testimony, this was seized after the arrest in this case.

THE COURT: Any other objections?

All right, I will permit it in.

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2 down here on the right-hand lower column on both of these
3 here, with the address of 150 West 225th Street, apart-
4 ment 2H. However, we stipulated, that is, counsel
5 for Miss Ware and the government have stipulated,
6 that the signature appearing on these money orders is not
7 the signature of Hattie Ware, the defendant.

8 BY MR. PHILLIPS:

9 Q Agent Nolan, did you have occasion to talk to
10 Harry Pannirello in July of 1973?

11 MR. LOPEZ: May I have a continuing objec-
12 tion, your Honor?

13 THE COURT: Yes, Mr. Lopez.

14 MR. LOPEZ: Thank you.

15 A Yes, I did.

16 Q Had he at that point decided to cooperate
17 with the United States Government?

18 A Yes, sir, he did.

19 Q Did you ever have occasion to show him any
20 photographs?

21 A Yes, I did.

22 Q How many did you show him?

23 A I showed him approximately 20 photographs of
24 white males and 20 photographs of black males.

25 MR. PHILLIPS: May these collectively be

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2 marked as Government's Exhibit 88 for identification.

3 (Government's Exhibit 88 was marked for iden-
4 tification.)

xx 5 Q I show you what has been collectively marked
6 as Government's Exhibit 88 for identification, Agent
7 Nolan.

8 Can you tell us if you can identify those photo-
9 graphs (handing)?

10 MR. LOPEZ: Objection, your Honor. Objec-
11 tion. I have a continuing objection on this.

12 THE COURT: Yes, you do.

13 Q Can you identify those photographs?

14 A Yes. Those are some of the photographs I
15 showed him, minus three.

16 Q I show you Government's Exhibit 79 for
17 identification. Is that another one?

18 A Yes, sir.

19 Q What did you say to Mr. Pannirello with respect
20 to these photographs?

21 A I told him I was going to show him photographs,
22 I want him to go through the photographs, if he recognized
23 anybody I wanted him to tell me by what name did he
24 know them by and how did he know them, in what manner.

25 Q With respect just to an individual by the name

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2 cf Joseph DiNapoli, did he indicate that any of the
3 photographs were that of Joseph DiNapoli?

4 A Yes, he did.

5 Q Would you pull out the photograph, if it is
6 there, that he indicated was that of Joseph DiNapoli?

7 Do you have it?

8 A Yes, sir.

9 MR. PHILLIPS: May it be marked as Govern-
10 ment's Exhibit 38A for identification.

11 (Government's Exhibit 38A was marked for
12 identification.)

13 MR. PHILLIPS: Your Honor, at this time may
14 Mr. Lopez and I approach the side bar?

15 THE COURT: Yes.

16 (At the side bar.)

17 MR. PHILLIPS: Your Honor, I want to offer
18 the photographs that were shown to Pannirello by Nolan,
19 but I don't want to do it with the B numbers on them, so
20 I prepared corresponding photographs without the B numbers.
21 If Mr. Lopez has no objection to having them substituted
22 as the same exhibit --

23 MR. LOPEZ: Your Honor, I am going to enter
24 an objection against this entire procedure. These
25 are certainly mug shots and what is happening here
is certainly the jury will get the impression from these

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2 photographs that Joseph DiNapoli has a prior criminal
3 record. I object on those grounds, your Honor.

4 I certainly will object to their offer
5 into evidence, particularly the ones of Joseph DeNapoli.

6 MR. EPSTEIN: Your Honor, might I inquire
7 if those photos include any of the individuals presently
8 on trial, those photos your Honor is now holding?

9 THE COURT: I don't know if it does.

10 MR. PHILLIPS: Pugliese's picture is in
11 there.

12 MR. EPSTEIN: Are we talking now about
13 Frank?

14 MR. PHILLIPS: Yes. That is Government's
15 Exhibit 79 for identification.

16 Paulie the Arrow's photograph was also shown.
17 That is Government's Exhibit, I believe, 51 for identi-
18 fication. That is not included in this pile before
19 me.

20 MR. LOPEZ: Might I see the photograph he ac-
21 tually picked out that you claim?

22 THE COURT: The cropped ones you can strain
23 your eyes.

24 MR. PHILLIPS: The one that he actually
25 picked out?

MR. LOPEZ: Yes.

MR. PHILLIPS: That is Exhibit 88 (handing).

MR. LOPEZ: Where is the photograph of DiNapoli that you want to propose to offer?

MR. PHILLIPS: Here (handing).

MR. LOPEZ: Naturally, I am strenuously objecting with a low voice.

THE COURT: Do you have the other pictures, Mr. Sunden?

MR. SUNDEN: I would like to see the 20 pictures of the black males.

MR. PHILLIPS: Yes. They are on the table. Mr. Fortuin will give them to you.

THE COURT: Mr. Sunden, I recognize that you want to represent your client as completely as possible, but on the other hand, if you intend to cross examine this witness --

MR. SUNDEN: I don't expect to, but --

THE COURT: My problem is please, please watch your questions so that no prior identification of the defendant Salley comes out.

MR. SUNDEN: Okay.

THE COURT: All right?

MR. SUNDEN: I don't expect to ask this fellow

any questions.

THE COURT: All right. I just want to make sure that you understand. There is that real danger. I don't want it to happen.

First of all, as to the substitution of the pictures, I think the substitution should be made so that you don't get the ones with the numbers across the chest.

Do you have those?

MR. PHILLIPS: Yes, these are right here.

THE COURT: All right. I will permit those to be marked as 88- whatever it is. I guess it would be 88B.

MR. LOPEZ: Judge Duffy, you are letting the cropped pictures in although they are mug shots with the numbers taken out?

I just want your Honor to be aware of United States against Harrington, your Honor, where I think this procedure was similarly tried in this circuit, your Honor, and a conviction was reversed on that basis.

I think the attempt by the government merely to take out the numbers still creates the impression and certainly the inference before the jury that this is a mug shot, a photograph of criminal identification, and I think that the prejudicial value of it is extremely high.

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2 THE COURT: I will permit them.

3 MR. LOPEZ: Your Honor, would you give a
4 limiting instruction as far as the photographs are
5 concerned as far as the jury is concerned, what effect
6 the purpose of this evidence is for, that this is merely
7 corroborative in nature at most and that it is not to be
8 taken as evidence in chief as far as the identification
9 of DiNapoli?

10 THE COURT: Yes.

11 MR. LOPEZ: You will do that?

12 THE COURT: Yes. Do you want me to do
13 it now?

14 MR. LOPEZ: Yes.

15 MR. PHILLIPS: I would object to such in-
16 struction because the law is clear it is not merely
17 corroborative but it is and can be used as substantive
18 evidence of the identification of DiNapoli.

19 MR. LOPEZ: No, no, and precisely under the
20 case that you mentioned, under Desisto it cannot, because
21 it wasn't taken under oath. At least you haven't
22 elicited that.

23 MR. PHILLIPS: We argued this at length.

24 MR. LOPEZ: I thought you lost.

25 MR. PHILLIPS: The issue was whether the

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2 exception to the hearsay rule is prior identification has
3 been a prior consistent statement that could be used, not
4 merely for impeachment purposes, but as substantive evi-
5 dence as well.

6 MR. LOPEZ: I don't think you have made
7 that ruling, your Honor. I have made a different type
8 of ruling right now. I don't think you have gone
9 that far.

10 THE COURT: I don't think I have either.
11 How much more is there with this witness?

12 MR. PHILLIPS: Very little.

13 MR. LOPEZ: Will you give the instruction?

14 THE COURT: Why don't you let me --

15 MR. LOPEZ: Okay.

16 THE COURT: I will tell you what I will
17 do. I will formulate something overnight instead of
18 having these things passed around.

19 MR. LOPEZ: Good. Thank you, your
20 Honor.

2 (In open court.)

3 MR. PHILLIPS: Your Honor, may these then be
4 marked as Government's Exhibit 88-B for identification
5 collectively and this one photograph be marked Govern-
6 ment's Exhibit 88-C for identification.

7 (Government's Exhibits 88-B and 88-C marked
8 for identification.)

9 MR. PHILLIPS: Pursuant to our discussion at
10 the side bar, your Honor, I think it can be stipulated that
11 the individuals depicted in Government's Exhibit 88-B for
12 identification are the same depicted in Government's Exhibit
13 88 and the individual depicted in Government's Exhibit --

14 THE COURT: No, no. I didn't understand that
15 there was any stipulation whatsoever. Just go ahead and
16 ask the questions.

17 MR. PHILLIPS: I will ask the witness, your
18 Honor.

19 BY MR. PHILLIPS:

20 Q Are the individuals in Government's Exhibit 88-B
21 for identification, in those photographs, the same as the
22 individuals in the photographs in Government's Exhibit 88
23 for identification, Agent Nolan?

24 MR. LOPEZ: Objection, your Honor.

25 THE COURT: No, I will permit it.

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A With the exception of these three photographs.

Q Would you put those aside.

Is Government's Exhibit 88-C in front of you,
do you have that?

A Yes.

Q Who is that a photograph of?

A Joseph Di Napoli.

Q Did you have occasion to interview Mr. Harry
Pannirello regarding his going to Joseph Di Napoli's girl
friend's house?

A Yes, I did.

Q What street did he tell you that house was on?

MR. LOPEZ: Objection, your Honor.

THE COURT: No, I will permit it. Go ahead.

A Bronxdale Avenue.

Q And what street did you write down in your
report?

A Randall Avenue.

Q Did you ever have occasion to take Harry
Pannirello to Bronxdale Avenue, the vicinity of Bronxdale
Avenue?

A Yes, I did.

Q When?

A Approximately a month to a month and a half

2 ago of this year.

3 Q Where on Bronxdale Avenue did you go, that is,
4 what blocks?

5 A We started I think approximately from where
6 Bronxdale Avenue intersects with White Plains and we
7 went about nine or ten blocks. I don't remember the exact
8 street. I think it was up near like Morrispark Avenue or
9 something like that.

10 Q And what numbers on Bronxdale Avenue did you go,
11 what numbered blocks?

12 MR. LOPEZ: Your Honor, may I have a continuing
13 objection to all this, all this line of questioning.
14 Mr. Pannirello testified to it on the stand.

15 THE COURT: I know. Make your objections one
16 at a time in this particular area.

17 MR. LOPEZ: Objection now, your Honor.

18 THE COURT: Sustained.

19 Q How many blocks did you travel?

20 A Approximately nine to ten.

21 Q What was the numbered block that you started
22 at?

23 THE COURT: He said he started at Westchester
24 Avenue.

25 Q The numbered block on Bronxdale Avenue.

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2 MR. LOPEZ: Objection, your Honor.

3 THE COURT: If he knows. Go ahead, answer.

4 A I know the intersection being White Plains and
5 Bronxdale. That's where we started.

6 Q You do not know the numbered block on Bronxdale
7 Avenue?

8 A No, not where we started.

9 Q Do you know what numbered block you finished
10 at?

11 A Yes, sir. We would have to finish up in the
12 1800 block.

13 Q Did you start higher than that or lower than that,
14 do you know?

15 A Higher.

16 Q I show you what has been marked Government's
17 Exhibit 81 in evidence. Can you identify that photograph?

18 A Yes, sir. I took this photograph, if I am not
19 mistaken, last Sunday.

20 Q What is depicted in that photograph?

21 A Depicted in that photograph is a series of red
22 brick houses, two stories. If I am not mistaken, it was
23 1900 to 1908 Bronxdale.

24 Q Which is 1908?

25 A It would be on my left, right here.

Q Did you drive by that series of houses with Harry Pannirello?

A Yes, I did.

Q Tell us, Agent Nolan, what occurred when you drove the first time along Bronxdale Avenue the nine blocks or so that you drove with Harry Pannirello.

MR. LOPEZ: Objection, your Honor.

THE COURT: I will sustain it.

MR. PHILLIPS: Your Honor, we are offering this evidence on the same basis as the evidence that he just testified about, the identification of Mr. Di Napoli.

THE COURT: Yes, I understand.

MR. PHILLIPS: If I may, we refer your Honor to the testimony --

MR. LOPEZ: Your Honor --

THE COURT: No, no.

MR. PHILLIPS: May I discuss this at the side bar?

THE COURT: Sure.

(At the side bar.)

MR. PHILLIPS: Your Honor, Mr. Lopez's cross-examination of Mr. Pannirello as well as Mrs. Patalano was geared toward establishing the fact that Harry Pannirello's direct testimony that the street that he went

2 to with Pugliese to see Joe Di Napolo was not Bronxdale
3 Avenue and that his testimony that it was Bronxdale
4 Avenue was a recent fabrication, a fabrication that was
5 made after he had spoken with myself. That was last
6 Saturday, toward the end of the day, pages 2561 and 2562
7 of the record.

8 It seems to me that equally admissible as the
9 prior identification of Di Napoli is the fact that he went
10 up to Bronxdale Avenue with this agent and that without any
11 prodding from the agent he pointed out not the specific
12 house, but that that series of houses looked like the house
13 that he went to.

14 That is all that this agent will testify to
15 THE COURT: No.

16 (In open court.)

17 MR. PHILLIPS: Your Honor, the government offers
18 Government's Exhibit 88-B and C for identification at this
19 time.

20 MR. FISHER: Against whom, if your Honor please?

21 THE COURT: I think we ought to take a look at
22 them first.

23 I will tell you what, ladies and gentlemen.
24 It's getting on toward evening. There are at least 20
25 items that will have to be looked at So I am going to

1 release you for the evening. I will see you back here
2 at 10 o'clock tomorrow morning.

3 (Jury left the courtroom.)

4 THE COURT: All right. Step down.

5 (Witness left the courtroom.)

6 MR. ELLIS: Your Honor, while the pictures are
7 going around perhaps I can make an observation about Mrs.
8 La Salata's testimony this morning.

9 The woman was obviously petrified as she came
10 into the courtroom. My first reaction to that was that
11 it was just the unfamiliar environment that had her intimidat-
12 ed and I assumed that might have been the impression of the
13 jury too. But as the questioning proceeded, as Mr.
14 Curran developed this image of Pugliese at her door con-
15 tinually and this woman afraid to go to the door for whatever
16 private unexpressed reason, it created an overwhelming at-
17 mosphere of prejudice in this courtroom. The fear was
18 almost a tangible thing.

19 I call your Honor's attention to the fact that
20 during the jury selection process several jurors, at least
21 one juror, to my recollection, refused to participate in
22 this case after she was qualified because of the Mafia
23 personality, she didn't want to get involved with the
24 Mafia.
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2 Judge, that testimony given by the lady this
3 morning had no probative value toward any issue in this
4 case. If Mr. Curran was suggesting that the witness was
5 somehow intimidated or there was an attempt to intimidate
6 her, he has a proper remedy before a grand jury.

7 The injection of that matter in this case
8 prejudiced my client and I move for a mistrial. In the
9 alternative, I ask that the testimony be stricken, that the
10 prosecution not be permitted to refer to those incidents in
11 summation.

12 THE COURT: All right. The motion is denied.
13 Anything else?

14 MR. POLLAK: I assume that motion is made on
15 behalf of all counsel, your Honor.

16 THE COURT: Oh, sure, absolutely.

17 MR. DOWD: Your Honor, I would like to get it
18 straight for the record, just to make sure it's in the
19 record, what tape it is claimed now that the government
20 says constitutes a conversation between my client and Albert
21 Cassella on January 10, 1973.

22 I understand the latest, if I am not incorrect,
23 is now a tape called M78. Is that right, Mr. Phillips?

24 MR. PHILLIPS: That is what we are informed by
25 the individuals that were in charge of that investigation,

2 specifically, the detectives from the formerly known as
3 Special Investigation Unit, SIU, now MIS.

4 I have not listened to the tape. I turned
5 over copies of all of those tapes to you, Mr. Dowd.
6 The latest two were turned over somewhere between two and
7 three weeks ago. The others were all turned over to you
8 at the beginning part of January.

9 MR. DOWD: My point is simply this, your Honor.

10 THE COURT: Do I have to listen to the tapes?

11 MR. DOWD: No, not at this point. I just want to
12 clarify.

13 Last night I was told two other tapes and I
14 stayed up about five hours replaying these tapes, you know,
15 relying on Mr. Phillips' representations of yesterday.
16 Now he is telling me it's a different tape, which I am
17 going to listen to again tonight.

18 I don't want to burden your Honor with this,
19 but I want to find out whether he is going to tell me
20 tomorrow it's four other tapes.

21 THE COURT: Wait until tomorrow and be surprised.
22 All right?

23 MR. DOWD: Your Honor, tomorrow morning I would
24 like to be heard further to put some remarks of mine in
25 the record with respect to the order I received today.

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2 I don't want to burden the Court with it this afternoon.

3 THE COURT: Sure. That is the question on the
4 rejoinder, right?

5 MR. DOWD: Yes, your Honor, it is.

6 MR. LOPEZ: Your Honor, as to Mr. Phillips'
7 offer on 88-C and 88-B, the photographs that were shown,
8 according to this witness's testimony, to Harry Pannirello,
9 I have objections to all. But barring that and saving that
10 exception, the photograph 88-C is a photograph of Joseph
11 Di Napoli. If that is let in that is one thing.

12 However, if we allow 88-B in, which is a group
13 of wild people, I think that is extremely prejudicial and
14 certainly brings forth the impact to the jury that this is
15 a rogues' gallery and that they showed the witness Harry
16 Pannirello quite a group of individuals who certainly look
17 threatening by a look at the pictures. Certainly I would
18 therefore object.

19 If you want to be probative and allow 88-C
20 over my objection, that is one thing. But to allow the
21 jury to see 88-C and then, for purposes of prejudice only,
22 allow them to see a group of other photographs -- they
23 already know, your Honor, that there was a group of 20-
24 some-odd photographs white and 20-some-odd black, so they
25 know this is one of many. So I certainly object to

1 hp11

3416

2 88-Bas well as object to 88-C.

3 THE COURT: All right.

4 MRS. ROSNER: Your Honor, with respect to the
5 matter Mr. Dowd mentioned, I have not yet received a copy
6 and consequently have not been able to listen to the tape
7 recording that purports to be the one of the Exhibit 64
8 which I referred to this morning.

9 I will inquire through the Court whether the
10 government intends to elicit the statement in that report
11 attributed to my client. If we can have an answer to that,
12 your Honor, perhaps that would solve some of the other
13 problems related to that document.

14 MR. PHILLIPS: No, we don't, your Honor.

15 MRS. ROSNER: Thank you.

16 MR. RICHMAN: Your Honor, I have been rather
17 quiet the last few days.

18 With relation to the government's case, your
19 Honor, it's my understanding that the probability of the
20 million dollars being introduced will be some time tomorrow
21 afternoon or tomorrow during the day.

22 THE COURT: I hope that the government's case
23 will be completed tomorrow.

24 MR. RICHMAN: In that event, your Honor --

25 THE COURT: I would suspect that they would be

1 hp12

2 considering offering the million dollars.

3 MR. RICHMAN: In that event, your Honor, I would
4 like to be heard with reference to that, since I will not
5 be here tomorrow.

6 THE COURT: Yes. Go ahead.

7 MR. RICHMAN: With relation to the money, your
8 Honor, as it reflects upon Benjamin Tolopka, Benjamin
9 Tolopka's participation or alleged participation in this
10 so-called conspiracy occurred on or about August to October
11 of 1970.

12 By the testimony of the government's own witness,
13 and I refer to page 1330 of the transcript of this trial,
14 line 10, Tolopka ceased being a member of this conspiracy
15 when he was permanently stated that he would not be
16 participating in any further activities, allegedly.
17 This is Barnaba's testimony. I draw your Honor's attention
18 to U.S. vs. Cirillo and the withdrawal of a participant in
19 a conspiracy.

3 20 I suggest, your Honor, that this million dollars
21 cannot be introduced as against Benjamin Tolopka and to
22 so introduce it would be prejudicial as to his case and
23 preclude him from having the possibility or even the
24 opportunity of a fair trial. That is 72 Cr 309.
25 The government's memorandum of law makes reference to the

1 hp13

2 same case, your Honor.

3 In addition to that, your Honor, the alleged
4 participation of a conspirator in future acts of this
5 conspiracy, these acts must be not too remote in time or
6 place to be relevant. I submit that the introduction or
7 the use of this money in this conspiracy as against
8 Benjamin Tolopka is so remote in terms of time and space,
9 namely, two and a half years, or its discovery two and a
10 half years after his ceasing being a part of this con-
11 spiracy, would also further indicate that it should not be
12 allowed.

13 I would call your Honor's attention to U.S. vs.
14 Stromberg, 268 Fed. 2nd 256 and U.S. vs. Nuccio, 373 Fed.
15 2d 168.

16 A further point, your Honor. With reference to
17 this money, although it doesn't relate to Benjamin Tolopka
18 directly, I submit that this money introduced in this
19 particular case is really stretching the bounds of
20 credibility. It seems to me that this money is evidence
21 in search of a case. Every opportunity that the government
22 has a chance to drum up some business for itself, they
23 introduce this money. It was introduced in an extortion
24 case, it was introduced in a tax case, it was introduced
25 in the French Connection case, and now we have it here.

1 hp14

2 Now, somewhere this has to stop being moved around.

3 The government has not shown any need for this
4 kind of money in this case. This entire case is a nickel
5 and dime case. The government is wasting taxpayers'
6 money and effort and introducing this million dollars is
7 so prejudicial to the jury as to deprive these defendants
8 of a fair trial.

9 THE COURT: Yes, Mr. Fisher. Mr. Richman I
10 understand keeps Saturday as his religious day. Do you
11 have the same kind of problem?

12 MR. FISHER: For other reasons, your Honor,
13 I would absent myself tomorrow.

14 THE COURT: All right.

15 MR. FISHER: Mrs. Rosner will cover for me,
16 with my client's consent.

17 THE COURT: All right.

18 MR. FISHER: If I could just briefly address
19 myself to the question of the ubiquitous comestible, to wit,
20 the million dollars, as Mr. Richman so well put it, it
21 seems to pop up all over the place.

22 If your Honor please, as I understand the
23 government's position here this money is admissible because
24 it tends to corroborate certain allegations made directly
25 or indirectly by various of its witnesses that Mr. Di Napoli

at some point or another received substantial quantities of money, Q.E.D., if he is found in possession of a substantial sum of money at a date that is not too relatively remote, the government's argument continues, therefore it tends to corroborate what the witnesses have been saying.

The balancing here as I see it, your Honor, is that at best there is a classic and horrible case of overkill. The most that can be directly, should the testimony be believed, connected to the defendant Di Napoli is \$22,000. By the furthest stretch of imagination, a possible two more kilos worth, or a possible 65 or 66 thousand. Now, that comes just nowhere near a million dollars.

As we said again and again, your Honor, we have \$900,000 of evidence of assorted speculative criminal activity, because nobody can possibly conceive for any instant it is come by legitimately and the jury is invited, in fact, drawn, compelled to speculate on what kind of criminal activity Mr. Di Napoli has been involved in, activity, your Honor, that the government has been unable to connect to the conspiracy charge in this case.

In addition, your Honor, I think such a vast sum of money that the government would thus introduce here tends to prejudice the remaining defendants, such as my client, as well. The crime charged in part is association. No matter

1 hp16
2 how violently your Honor instructs this jury to the con-
3 trary, at one point or another someone is going to have
4 to admit association may be an element of the proof here.

5 Frankly, your Honor, association with someone
6 who is successful enough to have a million dollars in a
7 suitcase, representing reams of criminal activity, can in
8 no way help any of these defendants and I think clearly
9 prejudices them in the light of the jury.

10 I don't believe this is a nickel and dime case,
11 most respectfully, but it's not a million dollar case
12 either, your Honor.

13 MR. RICHMAN: May I add something, your Honor.
14 I am sorry I got carried away for a moment. It's just
15 that it has been a long and tedious trial. One further
16 point I neglected to mention.

17 The introduction of this money may open the
18 door to certain circumstances which will require testimony
19 of certain persons that would prejudice the defendants in
20 this case or a defendant in this case. I am making reference
21 to --

22 You are not going to be here tomorrow either?

23 MR. ELLIS: I will, your Honor, but I don't want
24 to get off the matter of the photographs and let that
25 rogues' gallery, as Mr. Lopez put it, sneak in.

Anything that is going to create an atmosphere of criminality in this case --

THE COURT: I heard the objection.

MR. ELLIS: Did I understand your Honor to say he will hear argument on the million dollars tomorrow?

THE COURT: No, I didn't say that. Somebody asked if there could be a little time for argument about the million dollars and I said sure, tomorrow.

Because of Mr. Richman's religious observance of tomorrow, I figured that he ought to be heard from today. Mr. Fisher is not going to grace us with his company and large words tomorrow, so he also --

MRS. ROSNER: Large company and words.

THE COURT: I thought he was on a diet.

MR. FISHER: I am.

THE COURT: All right. I will see you all tomorrow.

1 MR. PHILLIPS: Your Honor, I was going to
2
3 suggest -- this is a matter that really only pertains to
4 Mr. Rosenberg --

5 MR. ROSENBERG: I am here.

6 MR. PHILLIPS: With respect to the offer the
7 government made this morning of some narcotics that was
8 found in a garage and to which Mr. Pugliese pleaded guilty
9 in the state court two or three years ago, Mr. Rosenberg
10 indicated that he wanted to have a hearing on the legality
11 of the seizure of the narcotics.

12 THE COURT: Yes.

13 MR. PHILLIPS: I have the detective in my
14 office who seized the narcotics right now. If your
15 Honor would want to have a hearing we would be prepared
16 to go forward and it might save some time and give
17 your Honor some time to think about the legal issues
18 involved after hearing what the facts are.

19 MR. ROSENBERG: Your Honor, may I suggest,
20 since you have 't ruled as to whether or not you are
21 going to permit the government to enter the evidence, in
22 the event that you should decide to permit it, then I
23 would argue with respect to a suppression.

24 THE COURT: Yes, I hear you both.

25 We are not going to have a hearing this after-

noon and I would not even suggest that you suggest that we have one this afternoon.

All right, 10 o'clock tomorrow morning.

MR. CURRAN: Your Honor, one other item just occurred to me.

As you know, Mr. Fisher has requested the return of Mr. Barnaba for some additional cross examination on the tape.

MR. FISHER: Yes.

MR. CURRAN: Mr. Barnaba is available and I had hoped and thought we would have gotten to him this afternoon after Agent Nolan.

MR. FISHER: It may be quite possible we can agree on a stipulation that will obviate the necessity of recalling him.

THE COURT: If you fellows can work it out, go to it.

MR. CURRAN: We will try to, your Honor. Mr. Fisher will not be here tomorrow.

THE COURT: All right.

(Adjourned to February 23, 1974, at 10:00

a.m.)

WITNESS INDEX

<u>Name</u>	<u>Direct</u>	<u>Cross</u>	<u>Redirect</u>	<u>Recross</u>
Joseph A. LaSalata	3293	3307	3313 3332	3324
Ella LaSalata	3344	3352		
Milton Starr	3365	3373		
Arthur Carter, Jr.	3377	3383		
John Nolan	3390			

EXHIBIT INDEX

<u>Government</u>	<u>Identification</u>	<u>In Evidence</u>
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83		3376
85	3391	
85A	3392	
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86A	3395	3397
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